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AR14

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UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION

10 In re	Case No.09-72349-EDJ
11 EDILBERTO A. SOLIVEN AND SHIRLEY M. SOLIVEN,	Chapter 7
12 Debtor(s).	R.S. No. CJR-497
	MOTION FOR RELIEF FROM AUTOMATIC STAY (11 U.S.C. § 362 and Bankruptcy Rule 4001)
15	DATE: February 19, 2010
16	TIME: 10:00AM
	CTRM: 215
17	1300 Clay Street
18	Oakland, CA 94604-1426

19 US Bank National Association, as Trustee for WFASC 2005-AR14 ("Movant"), moves
20 this court for an order terminating the automatic stay of 11 U.S.C. § 362 as to Movant, so that
21 Movant may commence and continue all acts necessary to enforce its security interest in real
22 property generally described as 1617 Saintsbury Drive, Las Vegas, Nevada 89144.

23 On or about December 24, 2009, Edilberto A. Soliven and Shirley M. Soliven
24 ("Debtors") filed a voluntary petition under Chapter 7 of the Bankruptcy Code, and Lois I.
25 Brady was appointed as Chapter 7 Trustee. As a result of said filing, certain acts and
26 proceedings against Debtors and the bankruptcy estate are stayed as provided in 11 U.S.C.
27 § 362.

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1 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and
2 362(d)(2).

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I.**

5 **MOVANT IS ENTITLED TO RELIEF FROM THE**
6 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

7 **NO EQUITY**

8 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
9 debtor does not have any equity in the property and the property is not necessary to the debtor's
10 effective reorganization.

11 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:
12 § 362(d)(2) reflects congressional intent to allow creditors to
13 immediately proceed against the property where the debtor has no
14 equity and it is unnecessary to the reorganization, even where the
15 debtor can provide adequate protection under § 362(d)(1).
16 (Emphasis added).

17 *Id.* at 610 (emphasis added).

18 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court
19 stated that in determining whether equity exists in the property for purposes of § 362(d)(2), all
20 encumbrances are totalled, whether or not all the lienholders have joined in the request for relief
21 from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194
22 (9th Cir. 1984).

23 An appropriate cost of sale factor should also be added to determine if the debtor has
24 any equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R.
25 283, 289 (Bankr. S.D. Cal. 1982).

26 On or about April 13, 2005, Debtors, for valuable consideration, made, executed and
27 delivered to Wells Fargo Bank, N.A. ("Lender") a Note in the principal sum of \$690,000.00
28 (the "Note"). Pursuant to the Note, Debtors are obligated to make monthly principal and interest
 payments commencing June 1, 2005, and continuing until May 1, 2035, when all outstanding
 amounts are due and payable. The Note provides that, in the event of default, the holder of the

1 Note has the option of declaring all unpaid sums immediately due and payable. A true and
2 correct copy of the Note is attached to the Declaration in Support of Motion for Relief From
3 Automatic Stay as exhibit A and incorporated herein by reference.

4 On or about April 13, 2005, the Debtors made, executed and delivered to Lender a Deed
5 of Trust (the "Deed of Trust") granting Lender a security interest in real property commonly
6 described as 1617 Saintsbury Drive, Las Vegas, Nevada 89144 (the "Real Property"), which is
7 more fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and
8 costs incurred as a result of the Debtors' bankruptcy case may be included in the outstanding
9 balance under the Note. The Deed of Trust was recorded on April 21, 2005, in the Official
10 Records of Clark County, State of Nevada. A true and correct copy of the Deed of Trust is
11 attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit B
12 and incorporated herein by reference.

13 Subsequently, all beneficial interest in the Deed of Trust was sold, assigned and
14 transferred to Movant. A true and correct copy of the Corporation Assignment of Deed of Trust
15 evidencing the Assignment of the Deed of Trust to Movant is attached to the Declaration in
16 Support of Motion for Relief From Automatic Stay as exhibit C and incorporated herein by
17 reference.

18 The obligation under the Note is in default as of January 1, 2009, for failure to make
19 payments to Movant. As of January 15, 2009, the total obligation due and owing under the Note
20 is in the approximate amount of \$750,402.60, representing the principal balance of
21 \$689,861.70, interest in the sum of \$45,461.40, late charges in the amount of \$1,350.96, escrow
22 advances in the amount of \$10,530.12, and a recoverable balance in the amount of \$3,198.42.
23 This is an approximate amount for purposes of this Motion only, and should not be relied upon
24 as such to pay off the subject loan as interest and additional advances may come due subsequent
25 to the filing of the Motion. An exact payoff amount can be obtained by contacting Movant's
26 counsel. Further, Movant has incurred additional post-petition attorneys' fees and costs in
27 bringing the instant Motion. Moreover, the total arrears under the Note are in the approximate
28 sum of \$68,006.68, excluding the post-petition attorneys' fees and costs incurred in filing the

1 instant Motion. A true and correct copy of the contractual payment accounting pursuant to
2 Local Rule 4001-1(g)(1) is attached to the Declaration in Support of Motion for Relief From
3 Automatic Stay as exhibit D and incorporated herein by reference.

II.

RELIEF FROM STAY

LACK OF EQUITY

Movant is informed and believes that, based on the Debtors' bankruptcy Schedules and Statements, the fair market value of the Property is approximately \$625,000.00. True and correct copies of the Debtors' bankruptcy Schedules "A" and "D" are collectively attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit E and incorporated herein by reference.

Based on the above, Movant maintains that the equity in the Property is as follows:

Fair Market Value:	\$625,000.00
Less:	
Movant's Trust Deed	\$750,402.60
Clark County Tax Collector's Trust Deed	\$1,000.00
Costs of Sale (8%)	<u>\$50,000.00</u>
Equity in the Property:	\$<176,402.60>

As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since this is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

III.

MOVANT IS ENTITLED TO RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).

CAUSE - LACK OF ADEQUATE PROTECTION

Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to adequate protection of its interest in the Property.

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1 Movant submits that adequate protection in this case requires normal and periodic cash
2 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed
3 to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

4 Movant is informed and believes that Debtors are presently unwilling or unable to
5 provide adequate protection to the Movant and there is no probability that adequate protection
6 can be afforded to Movant within a reasonable time.

7 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.
8 § 362(d)(1), based upon the failure of Debtors to provide adequate protection to Movant.

9 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

10 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the
11 enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of
12 Trust;

13 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

14 3. Granting Movant leave to foreclose on the Real Property and to enforce the
15 security interest under the Note and the Deed of Trust, including any action necessary to obtain
16 possession of the Property;

17 4. Permitting Movant to offer and provide Debtors with information re: a potential
18 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan
19 Workout/Loss Mitigation Agreement, and to enter into such agreement with Debtors;

20 5. Alternatively, in the event this court declines to grant Movant the relief requested
21 above, Movant requests that an Order for adequate protection be issued, requiring the Debtors to
22 reinstate and maintain in a current condition all obligations due under the Note and Deed of
23 Trust and all other deeds of trust encumbering the Real Property, including Debtors' obligations
24 to pay when due (a) the monthly installments of principal and interest, as required under the
25 Note; (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtors
26 in order to protect Movant's interest in the Real Property, including all attorneys' fees and costs
27 incurred in the filing of this motion;

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1 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion
2 be included in the outstanding balance of the Note as allowed under applicable non-bankruptcy
3 law; and

4 7. For such other and further relief as the court deems just and proper.

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6 Dated: January 26, 2010

PITE DUNCAN, LLP

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/s/ CASPER J. RANKIN (CA SBN 249196)
9 Attorneys for US BANK NATIONAL
ASSOCIATION, AS TRUSTEE FOR WFASC
10 2005-AR14

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